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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92047383
Party	Defendant BRACE INTERNATIONAL, INC.
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Attachments	Brace reply.pdf (6 pages)(28804 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK AND APPEAL BOARD**

SAWATACON LIMITED and)	
THOMAS M. SAWA,)	
)	
Petitioners,)	
)	
v.)	Cancellation No. 92047383
)	
BRACE INTERNATIONAL, INC.)	
)	
Registrant.)	
_____)	

**REGISTRANT’S REPLY BRIEF IN SUPPORT
OF ITS MOTION FOR SUMMARY JUDGMENT**

On November 2, 2007, Petitioner Dr. Thomas Sawa (“Petitioner”) filed a paper entitled “Petitioner’s Response to Registrant’s Answer to Petition for Cancellation” (hereinafter, the “November 2nd Response”). To the extent that this Board considers Petitioner’s November 2nd Response to be a response to Registrant Brace International, Inc.’s (“Brace”) Answer, Brace hereby requests that, pursuant to TBMP Rule 311.03¹, the response be ignored. Notably, Brace has not raised any counterclaims, and therefore, Petitioner’s November 2nd Response is

¹ TBMP Rule 311.03 states:

Although Trademark Rules 2.106(b) and 2.114(b) require that an answer to a counterclaim be filed, within the time designated by the Board, they specifically provide that a reply to an affirmative defense need not be filed. Similarly, Fed. R. Civ. P. 7(a) provides that there shall be a complaint and an answer and a reply to a counterclaim denominated as such; that certain other specified pleadings, not relevant to Board proceedings (and not including a reply to an answer), shall be allowed; but that “[n]o other pleading shall be allowed, except that the court may order a reply to an answer.”

Thus, while a plaintiff must file an answer to a counterclaim, a reply to an answer need not, and should not, be filed.

improper by rule. And since Petitioner has not filed a proper response to Brace's Motion for Summary Judgment, Registrant's Motion for Summary Judgment should be granted as conceded. *See* Trademark Rule 2.127(a).

To the extent that this Board considers Petitioner's November 2nd Response to be a mistitled Response to Registrant's Motion for Summary Judgment, pursuant to TBMP Rule 502.02(b), Brace's reply to Petitioner's brief is discussed herein.

I. INTRODUCTION

In its Motion for Summary Judgment, Brace demonstrated that there is no material issue of fact as to whether Brace and Petitioner were parties to a previous cancellation proceeding initiated by Petitioner and that judgment was entered against Petitioner. In its November 2nd Pleading, Petitioner does not dispute these facts. Rather, Petitioner introduces facts and other statements that have no bearing on this Board's determination of whether the doctrine of res judicata prevents Petitioner from bringing this current cancellation proceeding. Because the facts underlying Brace's claim for summary judgment on the basis of res judicata are not in dispute, Brace is entitled to entry of summary judgment in its favor.

II. ARGUMENT

Under TBMP Rule 528.01, "a dispute over a fact that would not alter the Board's decision on the legal issue will not prevent entry of summary judgment." Therefore, while Brace disputes many of the facts contained in Petitioner's November 2nd Response, the resolution of these facts does not affect the legal issue of whether Brace is entitled to summary judgment on the basis of res judicata.

For instance, Petitioner states in the first paragraph of its November 2nd Response, "[a]s was stated in my original submission, the Sawa Shoulder Brace was invented by me and first commercially distributed by me in 1988 prior to Brace International becoming involved with the

product.” The resolution of this factual issue has no bearing on whether Petitioner was a party to a previous cancellation proceeding in which judgment was entered in Brace’s favor against Petitioner. The following statements made by Petitioner in its November 2nd Response also have no bearing on Brace’s entitlement to summary judgment on the basis of res judicata:

- “Any Trade Mark [sic] application by Brace International is tainted by the fact given that there was no consent given by me to use my invention or surname on any Brace International products.”
- “I am a senior and experienced member of the International Chiropractic and sports medical community.”
- “The use of my surname in the Brace International Products has created obvious difficulty for me throughout my practice and the marketing of my products in the United States and I request that steps be taken to terminate Brace International’s illegal activity so that the American public will not be confused by illegitimate products.”
- “I am not personally aware of any such difficulties and respectfully request that this matter be solely oriented around the ownership issues and not collateral issues.”

Simply put, Petitioner is attempting to relitigate substantive issues that Petitioner has already litigated and lost. In the first trademark cancellation proceeding, Brace successfully defended itself against these allegations. Under the doctrine of res judicata, Brace should not be forced to continually relitigate the same factual issues. *See Lawlor v. Nat’l Screen Service, Corp.*, 349 U.S. 322, 75 S. Ct. 865 (1955). In fact, Petitioner’s November 2nd Response serves to reinforce that Petitioner has no new issues to raise in the current cancellation proceeding. A

cursory review of the pleadings in the previous cancellation clearly shows an identicalness between the issues that Petitioner is raising in its November 2nd Response and those previously raised in the previous cancellation. Petitioner is not entitled to a second bite at the apple of justice.

Petitioner has also failed to dispute any of the salient facts that are material to the Board's resolution of Brace's summary judgment motion. In particular, Petitioner has not disputed that it was a party to the previous cancellation proceeding. Likewise, Petitioner has not disputed that Sawa is a privy of Sawatacon. In addition, Petitioner has not disputed that the registration at issue in the previous cancellation proceeding is identical to the registration at issue in this cancellation proceeding. Moreover, Petitioner has not asserted that its claims in this opposition proceeding are based on facts or events that were not in existence at the time of the previous cancellation proceeding. Finally, Petitioner has not disputed the fact that judgment was entered against Petitioner in the previous cancellation proceeding. All of these facts, which form the basis of Brace's Motion for Summary Judgment, are not in dispute. As discussed in Brace's Motion for Summary Judgment, this undisputed set of facts can only lead to the conclusion that Petitioner's current cancellation proceeding is barred by the doctrine of res judicata.

III. CONCLUSION

Petitioner has failed to show that there is any dispute over the material facts that form the basis of Brace's motion for summary judgment on the basis of res judicata. Rather, Petitioner implicitly concedes all of the issues necessary for this Board to enter judgment in Brace's favor, either by failing to file a proper response to Brace's Motion for Summary Judgment or failing to address these issues in its mistitled Response. Therefore, Brace respectfully requests that this Board grant summary judgment in favor of Brace.

DATED this 19th day of November, 2007.

Respectfully submitted,
GREENBERG TRAURIG LLP

By: /s/ Joel R. Feldman
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Attorneys for BRACE INTERNATIONAL, INC.

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that Registrant's Motion for Summary Judgment is being electronically transmitted to the Commissioner for Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3514 through the TEAS electronic filing system on November 19, 2007.

/s/ Joel R. Feldman
Joel R. Feldman, Esq.

CERTIFICATE OF SERVICE

I hereby certify that this **REGISTRANT’S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**, is being deposited with the U.S. Postal Service in a sealed envelope as first class mail with postage fully prepaid addressed to:

Thomas Sawa, President
Sawatacon Limited
2087 Dundas Street East Unit 102
Mississauga, ON L4X 1M2

This 19th day of November, 2007

/s/ Joel R. Feldman, Esq.

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